



SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA-2022-0006]

Rescission of Social Security Acquiescence Ruling 12-1(8)

AGENCY: Social Security Administration.

ACTION: Notice of Rescission of Social Security Acquiescence Ruling 12-1(8)—

Petersen v. Astrue, 633 F.3d 633 (8th Cir. 2011)—Whether a National Guard Technician Who Worked in Noncovered Employment Is Exempt from the Windfall Elimination Provision (WEP)—Title II of the Social Security Act.

SUMMARY: In accordance with 20 CFR 402.35(b)(2) and 404.985(e)(1), the Commissioner of Social Security gives notice of the rescission of Social Security Acquiescence Ruling (AR) 12-1(8).

DATES: We will apply this rescission notice on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stacey W. Harris, Office of the General Counsel, Office of Program Law, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-9180, or TTY 410-966-5609, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION: An AR explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (the Act) or regulations when the Government has decided not to seek further review of the case or is unsuccessful on further review. As provided by 20 CFR 404.985(e)(1), we will rescind an AR as obsolete and apply our interpretation of the Act or regulations if the Supreme Court overrules or limits a circuit court holding that was the basis of an AR.

On August 27, 2012, we issued AR 12-1(8) to reflect the holding of the United States Court of Appeals for the Eighth Circuit in *Petersen v. Astrue*, 633 F.3d 633 (8th Cir. 2011).¹ The Eighth Circuit held that the Civil Service Retirement System (CSRS) payments to dual-status National Guard technicians are based wholly on work “as a member of” a uniformed service pursuant to 42 U.S.C. 415(a)(7)(A)(III) and therefore qualify for the uniformed services exception to the windfall elimination provision (WEP) of the Act. The Eighth Circuit rejected our interpretation of 42 U.S.C. 415(a)(7)(A)(III) that monthly payments based on noncovered civilian employment, including the CSRS payments to dual-status National Guard technicians, are subject to the WEP.

On January 13, 2022, in *Babcock v. Kijakazi*, 142 S.Ct. 641 (2022), the Supreme Court upheld our interpretation of 42 U.S.C. 415(a)(7)(A)(III) that the CSRS payments to dual-status National Guard technicians do not qualify for the uniformed services exception to the WEP because they are not based wholly on the technicians’ service as a members of a uniformed service. The Supreme Court explained that even though dual-status technicians must maintain National Guard membership and wear military uniforms, their technician work is not performed “as”—in the role, capacity, or function of—a member of the National Guard. “[T]he role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard.” 142 S.Ct. at

¹ 77 FR 51842, *corrected at* 77 FR 54646 (September 5, 2012).

645. In addition, the Court explained, Congress explicitly classified the dual-status technicians as civilian employees of the Federal government. *Id.* at 646.

Because, in *Babcock*, the Supreme Court rejected the holding in *Petersen* by upholding our policy of applying the WEP to the CSRS payments of dual-status National Guard technicians, we are rescinding AR 12-1(8) in accordance with 20 CFR 404.985(e)(1).

(Catalog of Federal Domestic Assistance Program Nos. 96.002, Social Security–Retirement Insurance; and 96.004, Social Security–Survivors Insurance)

The Acting Commissioner of Social Security, Kilolo Kijakazi, Ph.D., M.S.W., having reviewed and approved this document, is delegating the authority to electronically sign this document to William P. Gibson, Federal Register Liaison for SSA, for purposes of publication in the Federal Register.

William P. Gibson,
Federal Register Liaison,
Office of Legislation and Congressional Affairs,
Social Security Administration.

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